IN THE MATTER OF a Board of Inquiry

appointed pursuant to s. 38(1) of the

Human Rights Code, R.S.O. 1990, c. H.19, as amended,

BETWEEN:

WILLIAM DWYER

Complainant

- and -

MUNICIPALITY OF METROPOLITAN TORONTO AND DALE RICHMOND

Respondents

AND BETWEEN:

MARY-WOO SIMS

Complainant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
AS REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL

Respondent

Dates of the Complaints:
January 9, 1990 and June 20, 1991, respectively

Date of Interim Decision: December 19, 1994

Board of Inquiry: Susan Tacon

Appearances:

Mark Hart on behalf of the Commission
William Dwyer on his own behalf
Susan Ursel on behalf of the Complainant Sims
George Monteith on behalf of the Respondents the Municipality of Metropolitan Toronto and Dale Richmond
Peter Landmann on behalf of the Respondent Her Majesty the Queen in Right of Ontario, as represented by the Ministry of the Attorney General

INTERIM DECISION

This interim decision deals with a number of preliminary motions and is given with very brief reasons because the complaints are scheduled for continuation on January 16, 17, 23 and 24, 1995. The full reasons for the various rulings may be incorporated in the final decision in these complaints.

It is appropriate to first note that, on October 24, 1994, following submissions, two other preliminary motions were disposed of in my ruling that the Sims and Dwyer complaints would be heard together and that, in so proceeding, all parties would have the right to fully participate in the hearing. This latter ruling was subject to my authority to control the hearing and, in particular, to preclude repetitive questions or an attempt to relitigate issues which have been settled between various parties. The reasons, given orally, which accompanied those rulings are not repeated herein.

With respect to a third preliminary motion heard on October 24th regarding notice, I reserved my decision on the basis that that issue need not be determined in order to hear the remaining preliminary motions and a ruling on the notice issue depended, at least in part, on the outcome of what has been described as the "scope of the complaint" preliminary motion. My ruling on the notice motion is given infra.

Submissions were heard orally or received in written form, as agreed by the parties, with respect to several preliminary motions which, for convenience, may be categorized as follows:

(a) a motion for adjournment of the proceedings pending the issuance of the decision of the Supreme Court of Canada in James Egan and John Norris Nesbit v. Her Majesty the Queen in Right of Canada (hereinafter referred to as "Egan");

(b) a motion that the complaints be dismissed as moot and that the scope of the Dwyer complaint be regarded as limited to extended health care benefits; in that regard, there was a subsidiary motion by counsel for the Commission and the Complainant Dwyer that, if the Dwyer complaint was characterized as limited to extended health care benefits, the complaint be amended to include survivor pension benefits and non-insured benefits;

(c) a motion regarding the jurisdiction of the Board with respect to the Charter and the impact of the Clinton decision.

The parties were given full opportunity to lead evidence with respect to the above motions. In that regard, oral testimony was given by W. Dwyer and M. Sims and other relevant facts were agreed to by the parties.

Having carefully considered the evidence and submissions of the parties, my rulings are next summarized.

1. Whether the Dwyer and Sims complaints should be adjourned pending the Supreme Court decision in Egan

Counsel for the respondents in the Sims and Dwyer complaints argued that the instant proceedings should be adjourned pending the ruling by the Supreme Court of Canada in Egan as that case, it was asserted, dealt with an opposite sex definition of "spouse" and, hence, would have significant, if not determinative, impact on the instant complaints. It was agreed that the Supreme Court had heard the appeal in that case on an urgent basis.

The motion was opposed by the other parties on several grounds, including that the Egan decision would not necessarily be dispositive of the instant complaints given the different statutory context and that further delay in dealing with the instant complaints was not desirable. Those parties did indicate that it

might be appropriate to hear the evidence on the merits in the instant complaints and then adjourn argument pending the decision in Egan.

Counsel for the respondents rejected that position on the basis that the evidence itself, particularly with respect to justification under s. 1 of the Charter should a contravention of s. 15 be found, might well be affected by the Court's ruling in Egan.

I am not persuaded that these proceedings should be adjourned in their entirety pending the ruling of the Supreme Court of Canada in Egan. This matter is to proceed on the dates already scheduled. I do regard it as appropriate, given the issues raised in Egan, that argument in the instant complaints not be heard until the issuance of the decision of the Supreme Court in that case. In so structuring the process, the parties - and this Board - will have the benefit of the guidance of the Supreme Court of Canada on the issue of an opposite sex definition of "spouse". Such a definition is clearly at issue in the instant complaints. This manner of proceeding would also afford an opportunity for re-opening the evidentiary portion of the hearing following the release of the Egan decision should such be warranted. In my view, this process fairly balances the competing interests involved.

2. Whether the Dwyer and Sims complaints are moot and the scope of the Dwyer complaint

Counsel for the respondents argued that the Dwyer and Sims complaints were moot or, in the alternative, the Dwyer complaint should not be broadened by amendment or, in the further alternative, any amendment to the scope of the Dwyer complaint should be permitted only in conjunction with a lengthy adjournment to permit the respondents and other affected parties the opportunity to prepare a defence.

It was not in dispute that Metro currently provides extended health care benefits to the same sex partners of its employees pursuant to an interim motion of Metro Council. That is, the Complainant Dwyer and the Complainant Sims currently receive extended health benefits for their same sex partners. It was also not in dispute that the provision of such benefits has continued despite the failure of the provincial government to enact Bill 167.

With respect to the Dwyer complaint, it is evident that the context in which that complaint arose embraced more than extended health care benefits. In my view, it need not be conclusively determined whether the complaint, as originally filed, is properly characterized as exclusively relating to extended health care benefits. Even assuming (without deciding) that is the proper characterization, I am satisfied that, in the instant circumstances, the Dwyer complaint should be amended to include allegations of discrimination with respect to the provision of benefits provided under the collective agreement to persons in opposite sex spousal relationships (referred to as non-insured benefits) and with respect to survivor pension benefits. Such an amendment would not fundamentally alter the nature of the complaint. Nor would such an amendment constitute prejudice to the respondents in the specific circumstances of the Dwyer complaint. My authority to so amend, in appropriate circumstances, is consistent with the jurisprudence.

I am not persuaded that an adjournment is necessary or appropriate at this juncture in order for the respondents to prepare their defence. Notice of a constitutional question was filed in September 1994 by counsel for the Commission and by the Complainant Dwyer, in accordance with my directions at the conference call commencing the hearing in this matter on April 25, 1994. The wording in those notices makes it evident that the Commission and the Complainant Dwyer regarded the complaint as broader in scope than extended health care benefits. Further, correspondence

between the Commission and the respondents in Dwyer much earlier, in August 1992, made evident the broader nature of the complaint. The respondents herein were entitled to assert that the Dwyer complaint was narrow in scope and should be confined to extended health care benefits. I have concluded that the respondents' arguments in that regard should not be sustained. The communications noted in this paragraph support the granting of the amendment sought and, as well, do not assist the respondents' assertions that an adjournment would be appropriate or necessary.

Counsel for the respondents acknowledged that, if the scope of the Dwyer complaint embraced more than extended health care benefits, the complaint could not properly be regarded as moot. With that position, I agree. Accordingly, there is no need to deal further with the issue of mootness except to note that my conclusions on this question in relation to the Sims complaint are likewise applicable to the Dwyer complaint.

With respect to the Sims complaint, the complaint as filed is limited to extended health care benefits. As noted, Metro is currently providing those benefits to the same sex partners of its employees. I do not disagree with the principles expressed in the jurisprudence cited regarding mootness. However, I do not regard the Sims complaint as moot. The motion of Metro Council was clearly described as interim pending provincial legislation. While Metro has continued to pay the benefits in question notwithstanding the defeat of Bill 167, the basis for that continuation is a matter of policy, not legal obligation. Moreover, the policy itself is but of recent vintage. This is not an instance where a practice has continued for an extended period of time and, thus, would support a conclusion that the complaint involved an abstract rather than a concrete question.

To accede to the responents' arguments would permit a respondent to grant the remedy sought ex gratia and without an express commitment

failure to give appropriate notice. That is not the case in the instant case. I am not persuaded at this stage in the proceedings that the Clinton decision is dispositive; the impact of that decision is more appropriately considered at the conclusion of these proceedings, again, when a factual context is available and the parties have the opportunity to make full submissions.

4. Notice

Given the rulings noted above, particularly with respect to the scope of the Dwyer complaint, I am of the view that notice of these proceedings is to be given forthwith to the bargaining unit C.U.P.E. Local 79 and to the Ontario Municipal Employees Retirement Systems ("O.M.E.R.S.") Board. The Complainant Dwyer is a member of that bargaining unit and the scope of the complaint includes non-insured benefits which are found in the collective agreement which is binding on him. C.U.P.E. Local 79 is a party to that collective agreement. Further, the relief sought regarding the survivor pension benefits warrants giving notice to the O.M.E.R.S. Board so that that body may assess whether or not it wishes to participate in these proceedings.

Counsel for the respondent in the Sims complaint asserted that, should the complaints proceed, notice to Ministries other than the Attorney General was necessary. This tribunal is not well situated to determine what Ministries might be affected by the complaints. Her Majesty the Queen in Right of Ontario, through her representative the Ministry of the Attorney General, is named as respondent in the Sims complaint and sought to participate as a party in the Dwyer complaint given that the Sims and Dwyer complaints were to be heard together. As mentioned, an earlier ruling upheld the right of the respondent Her Majesty the Queen in Right of Ontario to fully participate in these proceedings. In my view, this constitutes sufficient notice and further notice to specific Ministries as other representatives of Her Majesty the

Queen in Right of Ontario is not required in the circumstances.

DATED this December 19, 1994.

Susan Tacon
Chair, Board of Inquiry

to continue the remedy, thereby rendering the complaint moot but preserving the right to revert at any time to the previous practice. A complainant would be required to file another complaint, with the concomitant delay entailed in such a process. In my view, there is nothing in the jurisprudence or elsewhere which would commend such a manner of proceeding. It must be stressed that there is no suggestion that Metro Council intends to resile from its current policy. The benefits have continued to date despite the demise of Bill 167. However, the motion adopted by Metro Council was on an interim basis pending legislation, as noted, and the legal advice to Metro is that there is no obligation to extend the benefits in question. That context does not provide a sound basis for regarding the Sims complaint as moot. In the circumstances, the alleged contraventions pleaded in the Sims complaint remain outstanding. In that regard, it must be stressed that the respondent is Her Majesty the Queen in Right of Ontario, not the Municipality of Metropolitan Toronto, and relief is not sought against Metro.

In my view, a tribunal should act with caution when asked to dismiss a complaint without a hearing on the merits. The matters raised in the Sims complaint are complex and concern areas of the jurisprudence which might reasonably be characterized as relatively novel, unsettled and in flux. It may well be that the complainant is ultimately not successful. In the circumstances, however, I am not prepared to dismiss the Sims complaint as moot without a hearing on the merits. Given my conclusion, I need not deal with the question of the Complainant Sims' dignitary rights as a separate ground for finding that the complaint is not moot.

3. <u>Whether this Board has jurisdiction to consider the Charter and whether the Clinton decision is dispositive</u>

Counsel for the respondents in the Dwyer and Sims complaints assert, essentially, that this tribunal lacks jurisdiction to

consider Charter sues in respect of legisl ion other than the Human Rights Code. Further, it is submitted that the decision in Ontario Blue Cross v. Clinton, unreported, Ontario Divisional Court, May 3, 1994 (the "Clinton" case) is dispositive of the Dwyer complaint apart from any Charter implications. Submissions from all parties on this issue were in writing and this summary of the issues does not adequately reflect their efforts.

I intend to deal with this issue only briefly. It is apparent from the submissions that the issues involved in the extent and nature of a tribunal's authority to consider Charter issues in respect of legislation, including the tribunal's own enabling statute, is complex and evolving. I do not agree with counsel for the respondents that matters of this nature are appropriately dealt with by way of preliminary motions. The issues raised in the Sims and Dwyer complaints cannot be regarded as frivolous or speculative. As mentioned above, a tribunal should be cautious in dismissing complaints at a preliminary stage where serious issues are raised. I am satisfied that I have the jurisdiction, given the Board's enabling statute and the jurisprudence, to consider the Charter at least with respect to the Human Rights Code. Whether I am finally persuaded that I have the jurisdiction to consider other legislation and to grant the relief sought can only be determined at the conclusion of the hearing when I will have the benefit of an evidentiary context in which to assess the submissions of the parties. In my opinion, that is the proper point at which such an assessment should be made.

With respect to the Clinton decision, only a few brief comments are necessary. Evidently, the Clinton decision is under appeal and the ultimate outcome of the case is unknown. More critically, the representations of the parties with respect to the impact of the Clinton decision on the instant proceedings differ significantly. The reasons of the Divisional Court in Clinton were brief and, apparently, the Charter issue was not considered because of the